Nos. 85-5221 & 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

WILLIE DAVIS BROWN
a/k/a WILL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Writs of Certiorari to the Supreme Court of Kentucky and the Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) respectfully moves the Court, pursuant to Rule 36.3, for leave to file the attached brief as amicus curiae in support of the Petitioners.

Petitioners have consented to the filing; Respondent, State of Kentucky, has consented; Respondent, United States of America, has consented but no written consent has been received to date.

The NACDL is a District of Columbia non-profit corporation with a membership comprised of approximately four thousand lawyers, including representatives from every state.

NACDL was founded twenty-eight years ago to promote study and research in the field of criminal law, to disseminate and

advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

An integral part of the proper administration of criminal justice is the application of principles and procedures announced by the Court to cases other than that before the Court at that particular time. At present the question of when the Court's decisions will apply to other cases is difficult to answer. The issue of retroactivity has been addressed by the Court on numerous occasions, but no line has been drawn by which to judge whether a

ruling is retroactive or not. A clear answer is needed on the issue to provide the guidance needed by the lower courts and counsel to administer the criminal justice system properly. The NACDL wishes to file this brief to suggest that these cases present an appropriate opportunity to resolve the issue of retroactivity and to do so in favor of Petitioners.

Respectfully submitted,

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

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SUMMARY OF ARGUMENT

The cases before the Court present the recurring issue of retroactivity of a prior decision. When the Court ruled in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712 (1986), Petitioners herein had applied for writs of certiorari on the question of use of peremptory challenges. The Court must now decide whether the procedure clarified in Batson is applicable to convictions not yet final. The NACDL submits that it is.

As early as 1801 the Court recognized that the general rule in reviewing a case on direct appeal is to look to the law as it exists at the time of review. United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed 49 (1801). In Desist v. United States, 394 U.S. 244 (1969), Justice Harlan, in a dissenting opinion, proposed a view towards the issue of retroactivity

that has since become known as the Harlan approach. The basis of that approach is that application of a new rule of law to cases pending on direct review is necessary to avoid the Court acting as a super-legislature. For the limited purpose of deciding the cases before it, the Court adopted Harlan's reasoning in United States v. Johnson, 457 U.S. 537 (1982) and Shea v. Louisiana, 105 S.Ct. 1065 (1985). Beyond that, the Court has declined to draw the line specifically between cases on direct appeal and those on habeas review, yet such a distinction would be well founded. See: Linkletter v. Walker, 381 U.S. 618 (1965). The scope of review is different at the two levels. Furthermore, the need for finality has long been recognized and the completion of the direct appeal process marks that ending point. See: Shea v. Louisiana, supra.

Petitioners similarly situated should receive the same treatment. Principles of fairness prevail only when all of those whose cases are on appeal feel the effects of a ruling, not just the one whose case was selected for review. Furthermore, justice demands that if a lower court is reversed by the Court for reaching a decision that was wrong, other courts that reach the same decision, if still subject to review, must likewise be reversed. See: U.S. v. Johnson, 457 U.S. 537 (1982); Mackey v. U.S., 401 U.S. 667 (1971) (J. Harlan opinion); Desist v. U.S., 394 U.S. 244 (1969) (J. Harlan dissent).

A R G U M E N T

I. A CLEAR LINE OF RETROACTIVITY IS MANDATED AND JUSTIFIABLE FOR THOSE CASES PENDING ON DIRECT APPEAL.

Retroactivity of judicial decisions is neither compelled nor prohibited by the Federal Constitution. However, "[a]s a rule, judicial decisions apply 'retroactively.'" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 1341 (1984), quoting from Robinson v. Neil, 409 U.S. 505, 507-508 (1973). Varying degrees of retroactivity have been established as a result of the innumerable cases in which the Court has addressed the issue. New decisions have been given complete retroactive application to all prior cases or limited application only to those where the judgment is not yet final, or those where the trial has not yet begun.

The difference between the scope of review on direct appeal and collateral review has long been recognized. In U.S. v. Schooner Peggy, 1 Cranch 103, 110 (1801), Chief Justice Marshall wrote:

> It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. . . [and] where individual rights... are sacrificed for national purposes. . .the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

With regard to cases on collateral review ("habeas cases"), the Court should apply the constitutional standards that prevailed at the time the original proceeding took place. "[C]orrect application of...

that existing law] is all that is required to 'forc[e] trial and appellate courts... to toe the constitutional mark.' [Mackey v. U.S., 401 U.S. 667 at 687.]" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338 at 1347, (J. Powell concurring). As noted by Justice Powell in his concurrence in Hankerson v. North Carolina, 432 U.S. 233, 248 (1977), such an approach is "more attuned to the historical limitations on habeas corpus." See also: Solem v. Stumes, supra, (J. Powell concurring).

The distinction between direct and collateral review was most recently discussed in Shea v. Louisiana, 105 S.Ct. at 1070, wherein the Court stated:

> The distinction. . .properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere the closing must come.

It might seem that a dim line has been drawn between cases on direct appeal and on collateral review. However, numerous decisions rendered on the issue of retroactivity have generated "a welter of incompatible rules and inconsistent principles." U.S. v. Johnson, 457 U.S. at 546, quoting from Desist v. U.S., 394 U.S. 244, 258 (J. Harlan dissenting). Even the criteria for determining at what point to draw the line appears to differ according to the stage of litigation of the case at issue. In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court established the following three factors to consider:

> (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards.

Those factors were discussed in Solem v. Stumes, 465 U.S. 638 (1984), wherein the Court held that Edwards v. Arizona was not retroactive to cases on collateral review. The Court in Solem also referred to Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. Shott, 382 U.S. 406 (1966); and Johnson v. New Jersey, 384 U.S. 719 (1969). It is significant that each of those cases arose on collateral review. U.S. v. Johnson, supra, and Shea v. Louisiana, supra, which both came before the Court on direct appeal, addressed different factors. In each, the Harlan approach was employed, calling for application of the decision to all cases that had not reached the end of the appeal process -- finality. Though the Court has never clarified specifically what factors are to be considered in a specific type of case, a review of all of the cases shows that the Stovall v. Denno, supra, factors apply

to cases at the habeas level, whereas the Harlan approach has been applied to cases on direct appeal. This distinction was noted by District of Columbia Court of Appeals in Kirk v. U.S., (No. 85-804, June 5, 1986). Furthermore, the Stovall factors bear more practically on habeas cases because they usually involve long-standing convictions, thus the issues of reliance and effect on the system weigh much heavier.

Two exceptions to the Harlan approach have been recognized. Decisions which indicate a clear break from the past are invariably non-retroactive, and where a new decision bears on the trial court's lack of authority to convict or punish the defendant, it is to be applied retroactively to all cases. If the decision before the Court on the question of retroactivity does not fit into one of those categories

where retroactivity has already been decided, the Harlan general rule is considered.

In the dissents written in Shea v. Louisiana, supra, including one written by Justice Rehnquist, disfavor was expressed over drawing the line between direct appeal and habeas, but with exceptions. Specifically, the exception for "clear break" decisions was questioned. Such an exception does allow for continued inconsistency in the area of retroactivity. There is no definite criteria for determining when a decision marks a clear break from the past. In Solem v. Stumes, the Court held that, while Edwards v. Arizona did create a new "bright-line" rule, it was "not the sort of 'clear break' case that is almost automatically retroactive. 104 S.Ct. at 1343. What distinguishes a "bright-line" new rule from a "clear break"? This question remains unanswered.

It is clear that the time has come to draw a distinct line with respect to retroactivity. Embracing the Harlan approach to cases on direct appeal would make such a mark. Adoption of the approach without the "clear break" exception would clarify the muddy waters that, though lessened, are still muddled with the issue of clear break left open.

II. PRINCIPLES OF FAIRNESS AND JUDICIAL CONSISTENCY MANDATE APPLICATION OF A NEW RULE TO ALL CASES PENDING ON DIRECT REVIEW.

Petitioners' cases were pending before the Court on applications for writ of certiorari when the Court ruled in Batson v. Kentucky, supra. The issue addressed in Batson, the use of peremptory challenges by a prosecutor, had been raised in both applications. Petitioners convictions were not final. Their cases should be reviewed in light of the procedures outlined in Batson.

Justice Harlan based his approach on retroactivity on notions of "principled decision-making and fairness." Shea v. Louisiana, 105 S.Ct. at 1070. He recognized that convictions are not overturned and criminals released from jail because of the Court's desire to do so or because it seems wise. Such action is taken because "the government has offended con-

stitutional principle in the conduct of his case." Desist v. U.S., 394 U.S. at 258. That basic judicial tradition is abandoned when the Court simply picks and chooses one defendant from among several similarly situated and applies the "new" rule only to him. Justice Powell also addressed this problem also in his concurring opinion in Hankerson v. North Carolina, supra. Allowing one lucky individual whose case was chosen to enjoy retroactive application while others like him fell under the old doctrine "hardly comports with the ideal of 'administration of justice with an even hand.'" Id at p. 247, quoting from Desist v. U.S., supra at 255 (J. Douglas dissenting). As noted in Shea v. Louisiana, supra, in the absence of retroactive application, equal justice would prevail only if the "new" rule was confined to prospective application, unavailable even to the defendant whose

case prompted the decision. The petitioner in Batson v. Kentucky enjoys the benefit of that ruling; petitioners BROWN and GRIFFITH must likewise.

If defendants come before the Court with the same issues, justice must be done to each. In accordance with this responsibility, Justice Harlan stated:

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very argument we have embraced. Anything else would belie the truism that is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case.

Desist v. U.S., 394 U.S. at 259.

If the lower court in Batson v. Kentucky violated constitutional protection afforded under the Equal Protection Clause, the lower courts in the cases herein committed the same error. The Court, having revers-

ed the lower court in Batson, cannot now affirm decisions which reject the position embraced therein.

The approach proposed by Justice Harlan, adopted by various members of the Court in concurring and dissenting opinions and adopted by the Court for limited purposes in Johnson and Shea, is "closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine. Hankerson v. North Carolina, 432 U.S. at 246.

C O N C L U S I O N

Petitioners, who stand in the same position as the lucky beneficiary whose case is chosen for review, should benefit to the same extent as that similarly situated defendant. A clear and concise rule of retroactivity dictates that the same remedy should always apply on direct appeal.

Respectfully submitted,

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